No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Appellants

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QUESTIONS PRESENTED

1. Whether plaintiffs have standing to press their partisan gerrymandering claims.

2. Whether plaintiffs' partisan gerrymandering claims are justiciable.

3. Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

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Interest of Amicus Curiae[1]

The Public Interest Legal Foundation, Inc., (the "Foundation") is a non-partisan, public interest organization incorporated and based in Indianapolis, Indiana. The Foundation's mission is to promote the integrity of elections nationwide through research, education, remedial programs, and litigation. This case is of interest to the Foundation as it is concerned with protecting the sanctity and integrity of American elections and preserving the Constitutional balance of state control over their own elections. The Foundation's President and General Counsel, J. Christian Adams, served as an attorney in the Voting Section at the Department of Justice. Additionally, one of the members of the Foundation's Board of Directors, Hans von Spakovsky, served as counsel to the assistant attorney general for civil rights at the Department of Justice, where he provided expertise in enforcing the Voting Rights Act and the Help America Vote Act of 2002. Mr. von Spakovsky also served as a commissioner on the Federal Election Commission. The Foundation believes that this brief—exploring the Constitutional concerns implicated in the lower court's opinion—will aid in the Court's consideration of whether partisan gerrymandering claims are justiciable.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of briefs of *amici curiae*.

Summary of Argument

The authors of one of the constitutional provisions the challengers invoke here were elected under congressional districting plans that resulted in more political disparity than the challenged North Carolina plan presently before this Court.

Appellees point to recent North Carolina elections where the statewide vote results "were exceedingly close...[y]et Republican candidates captured nine of North Carolina's thirteen congressional seats in 2012, and *ten* seats in 2014 and 2016." Motion to Affirm of League of Women Voters of North Carolina, *et al.* at 13 (emphasis in original). As the Foundation shows in the charts to follow, North Carolina's recent elections resulted in less "partisan asymmetry" than the elections under which the members of the 39th Congress were elected.

The Framers left the power to run elections to the states. This includes how the states divide their congressional districts. As this Court has "observed, redistricting 'involves lawmaking in its essential features and most important aspect.'" *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2667 (2015) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The lower court invited unlimited federal intrusion into a core constitutional power granted to the states without Congress expressly permitting the intrusion.

The issue of a workable standard for partisan gerrymandering claims has plagued this and the lower courts for decades. At its core, there simply is no workable standard. When the question of whether partisan gerrymandering claims are justiciable was

before this Court more than thirty years ago, Justice O'Connor simply found that "[t]he Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment." *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

Yet the lower court divined, "Partisan gerrymandering runs contrary to both the structure of the republican form of government embodied in the Constitution and fundamental individual rights preserved by the Bill of Rights." J.S. App. 90. Looking at the nation's history, the lower court's reasoning falls short.

Argument

The lower court considered and rejected the "contention that founding era practice indicates that the founding generation viewed some amount of partisan gerrymandering as constitutionally permissible." J.S. App. 111. According to the lower court,

> [E]ven if some degree of partisan gerrymandering had been acceptable during the founding era, that does not mean that the ratification of the Fourteenth Amendment and the incorporation of the First Amendment against the States did not subsequently render unconstitutional the drawing of district lines to frustrate the electoral power of supporters of a disfavored party.

J.S. App. 115. However, a historical look at the Congress that passed the Fourteenth Amendment casts doubt on the lower court's reasoning.

I. The Original Intent of the Fourteenth Amendment Does Not Support Political Gerrymandering Causes of Action.

The original intent of the authors of the Fourteenth Amendment could hardly include a political gerrymandering cause of action. They were elected from districts with far greater disparity between statewide political preferences and the partisan composition of legislative delegations than those districts challenged here. The authors of the Fourteenth Amendment benefited from gerrymandered districts that, in one state, did not allow a single House representative from the opposing party despite statewide support approaching forty-nine percent. Districts that elected members to the 39th Congress that authored the Fourteenth Amendment were designed in a way that created overwhelming electoral dominance of one political party despite the other party having significant support in statewide elections.

The Common Cause Appellees refer to the challenged plan as "the most overt partisan gerrymander this Court has ever seen." Common Cause Motion to Affirm at 1. A simple analysis of the composition of the 39th Congress[2] in each state as compared to the

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[2] Biographical Directory of the United States Congress: 1774-present, *available at* http://bioguide.congress.gov. *See also*, Biographical Directory of the United States Congress 1774-2005, H. Doc. No. 108-222 at 170, *available at* https://www.govinfo.gov/content/pkg/GPO-CDOC-108hdoc222/pdf/GPO-CDOC-108hdoc222.pdf.

results of the 1864 Presidential election[3] in that state, shows that the disparity raised by the challengers here is mild compared to that of the district lines from the very Congress that authored the provision in the Constitution upon which they rely.

Indeed, in six states, Republicans held 100 percent of the seats in the House despite the Democratic candidate for President receiving over 40 percent of the popular vote in the state.

California

	Republican	Democrat
Representatives (39th Congress)	3	0
1864 Presidential Election, Popular Vote	58.6%	41.4%

Connecticut

	Republican	Democrat
Representatives (39th Congress)	4	0
1864 Presidential Election, Popular Vote	51.4%	48.6%

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[3] Results from the 1864 Presidential Election, The American Presidency Project, https://www.presidency.ucsb.edu/statistics/elections/1864.

Maine

	Republican	Democrat
Representatives (39th Congress)	5	0
1864 Presidential Election, Popular Vote	59.2%	40.8%

Michigan

	Republican	Democrat
Representatives (39th Congress)	6	0
1864 Presidential Election, Popular Vote	55.3%	44.7%

Minnesota

	Republican	Democrat
Representatives (39th Congress)	2	0
1864 Presidential Election, Popular Vote	59%	40.9%

New Hampshire

	Republican	Democrat
Representatives (39th Congress)	3	0
1864 Presidential Election, Popular Vote	52.6%	47.4%

In two states, Republicans held 100 percent of the seats despite the Democratic candidate for President receiving more than a quarter of the popular vote in the state.

Iowa

	Republican	Democrat
Representatives (39th Congress)	6	0
1864 Presidential Election, Popular Vote	64.1%	35.9%

Massachusetts

	Republican	Democrat
Representatives (39th Congress)	10	0
1864 Presidential Election, Popular Vote	72.2%	27.8%

In seven additional states, Republicans held the vast majority of the House seats despite the Democratic candidate for President receiving a significant percentage of the popular vote in the state, at times close to fifty percent.

Illinois

	Republican	Democrat
Representatives (39th Congress)	10 (plus one at-large member)	3
1864 Presidential Election, Popular Vote	54.4%	45.6%

Indiana

	Republican	Democrat
Representatives (39th Congress)	9	2
1864 Presidential Election, Popular Vote	53.5%	46.5%

Missouri

	Republican	Democrat
Representatives (39th Congress)	8	1
1864 Presidential Election, Popular Vote	69.7%	30.3%

New York

	Republican	Democrat
Representatives (39th Congress)	21	10
1864 Presidential Election, Popular Vote	50.5%	49.5%

Ohio

	Republican	Democrat
Representatives (39th Congress)	17	2
1864 Presidential Election, Popular Vote	56.4%	43.6%

Pennsylvania

	Republican	Democrat
Representatives (39th Congress)	15	9
1864 Presidential Election, Popular Vote	51.7%	48.3%

Wisconsin

	Republican	Democrat
Representatives (39th Congress)	5	1
1864 Presidential Election, Popular Vote	55.9	44.1

II. The Constitution Grants the States the Power Over Elections.

The power to regulate federal elections is directed by the Constitution. To the States, the Framers granted exclusively the authority to control who may vote in federal elections. *See* U.S. Const., Art. I, § 2, cl. 1 (election of Representatives), Seventeenth Amendment (election of Senators), and U.S. Const., Art. II, § 1, cl. 2 (presidential electors chosen as directed by state legislatures).

With respect to *how* federal elections are conducted, the Framers divided authority between Con-

gress and the States. Under the Constitution's Election Clause, Congress may regulate the "Times, Places, or Manner" of holding federal elections. U.S. Const., Art. I, § 4, cl. 1. Congress's power to regulate *how* elections are held, however, is superior to the States' power to do the same only when they differ.

To be sure, the States' power of redistricting is not absolute. It is subject to certain constitutional and statutory standards, often involving systems prohibited by the Fifteenth Amendment or well-established Fourteenth Amendment protections. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment") and *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

III. Allowing a Federal Cause of Action Under the First and Fourteenth Amendments for Partisan Gerrymandering Upsets the Constitutional Balance.

The lower court's invalidation of North Carolina's redistricting plan, however, was not based on well-established constitutional principles. Instead, the lower court found that "the General Assembly sought to advance the interests of the Republican Party at the expense of the interests of non-Republican voters." J.S. App. 155. Stunningly, the League of Women Voter Appellees make it clear that they believe claims of partisan gerrymandering are justiciable because claims of

racial gerrymandering are justiciable. Motion to Affirm of League of Women Voters of North Carolina, *et al.* at 26 ("It is implausible, in particular, that racial vote dilution could be justiciable—under both the Voting Rights Act and the Constitution, *see, e.g., Rogers v. Lodge*, 458 U.S. 613 (1982)—while partisan vote dilution is not.").

However, as this Court has made plain recently, states have the general power to manage their own elections subject to *explicit* and *well defined* exceptions. In *Shelby County v. Holder*, this Court considered whether Section 4 of the Voting Rights Act of 1965, the formula by which covered jurisdictions were chosen for the Act's "preclearance" requirement for changes in voting procedures, was constitutional. 570 U.S. 529 (2013). Ultimately, the Court determined that Section 4 was unconstitutional. *Id.* at 557. In so finding, the Court acknowledged that Section 5 of the Voting Rights Act, which "required States to obtain federal permission before enacting any law related to voting[,]" was "a drastic departure from basic principles of federalism." *Id.* at 535.

It is clear that "[t]he Federal Government does not…have a general right to review and veto state enactments before they go into effect." *Shelby County*, 570 U.S. 529, 542. However, the circumstances of the era during which the Voting Rights Act was enacted merited the "uncommon exercise of congressional power," *id.* at 545 (quotations and citations omitted).

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem"—racial discrimination in voting. *Shelby County*, 570 U.S. at 534. "'The lesson of the great decisions of

the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 n.35 (1978) (quoting A. Bickel, The Morality of Consent 133 (1975)).

Indeed, such "strong medicine" was chosen in order "to address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'" *Shelby County*, 570 U.S. at 535 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

But the "extraordinary measures" came with a price. As Judge Williams noted in his dissent in the D.C. Circuit case later reversed by the Supreme Court, "the federalism costs of § 5 are 'substantial.'" *Shelby County v. Holder*, 679 F.3d 848, 885 (2012) (J. Williams, dissenting) (citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

In *Shelby County*, this Court considered "whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements." 570 U.S. 529, 536. While the Court acknowledged that "voting discrimination still exists[,]" *id.* at 536, it also acknowledged that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions." 570 U.S. at 535.

There is no doubt that the federalism costs of shifting power away from the States and to the judiciary regarding redistricting are also substantial. The complaints of the Appellees of partisan disadvantage can hardly be said to describe an "extraordinary problem" akin to the racial discrimination that warranted the "unprecedented" measures of the Voting Rights Act. *Shelby County*, 570 U.S. at 534-35. The lower court's decision is an affront to the important federalist balance reaffirmed in *Shelby County* and should be rejected.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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